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No. 81-2337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN R. BLOCK, Secretary of Agriculture *Et Al.*,
Petitioners,

VS.

THE STATE OF NORTH DAKOTA, *Ex Rel.*
BOARD of UNIVERSITY and SCHOOL LANDS,
Respondents.

On Writ Of Certiorari To The
United States Court of Appeals For
The Eighth Circuit

BRIEF OF THE RESPONDENTS

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QUESTION PRESENTED

Whether a state acting in its sovereign capacity in an action to protect its rights to sovereign public trust lands against interference by federal officers is subject to the statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(f).

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STATUTES INVOLVED

In addition to 28 U.S.C. 2409a and 1346(f), set forth in Petitioners' Brief on pages 2 and 3, the following statutes are also relevant:

5 U.S.C. 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

28 U.S.C. 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. 2201 provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

43 U.S.C. 1301 provides in pertinent part:

> When used in this chapter—
>
> (a) The term "lands beneath navigable waters" means—
>
> (1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;
>
> * * * * * * *

43 U.S.C. 1311 provides in pertinent part:

> (a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;
>
> (b) (1) The United States releases and relinquishes unto said States and person aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources;...
>
> * * * * * * *

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THE STATE OF NORTH DAKOTA, *Ex Rel.*
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BRIEF OF THE RESPONDENTS

STATEMENT

This action was commenced by the respondent, the State of North Dakota (hereafter "the State") in federal district court on October 31, 1978. About one year earlier, State authorities learned that both the United States and the State had been issuing oil and gas leases to the bed of the Little Missouri River — the federal government since 1955, and the State since 1962 or earlier.[1] Notice of this dual leasing had not come to the attention of the appropriate State authorities before 1977 because no production had occurred that necessitated a determination of true ownership of the riverbed.

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[1]Old State leasing records have not been completely retained and preserved in the State's archives.

Before production begins, oil and gas developers are primarily concerned about having all potential owners under lease. Thus, oil and gas developers commonly buy "protective" leases from any potential owner. Since there was doubt about the navigability of the Little Missouri River and hence the ownership of the riverbed, oil and gas developers obtained "protective" leases from both the State and from riparian owners, including the United States. This dual leasing has occurred for over 20 years. Because the State received lease applications and successfully sold leases at public auction, it had no reason to know of leasing by the federal government. But in the mid-1970's, several oil and gas developers raised the issue of ownership because leasing costs had greatly increased and because drilling had begun on lands near and along the Little Missouri River. Once drilling and production occur, ownership must be settled so that any royalties may be properly paid.

The State therefore filed suit in federal district court, seeking a declaratory judgment that the Little Missouri is navigable and seeking injunctive relief against federal officials from interfering with the State's rights to the bed. The suit named Petitioners as defendants because they had issued leases to Little Missouri lands on behalf of the largest riparian owner, the United States.[2] The State asserted federal jurisdiction under 28 U.S.C. 1331 (federal question), sought a remedy under 28 U.S.C. 2201 (declaratory judgment), and claimed a waiver of sovereign immunity under 28 U.S.C. 1361 (mandamus) and 5 U.S.C. 701-706 (the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*). J.A. p. 6. Although the

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[2] Most of the federal riparian lands are acquired lands, not public domain. Generally, the surface estate is managed by the United States Forest Service and the mineral estate is managed by the Bureau of Land Management. Most of these lands were purchased from private landowners pursuant to the Bankhead-Jones Farm Tenant Act, 7 U.S.C. 1010-1012, originally enacted in 1937. There are also substantial amounts of state-owned and privately-owned riparian lands along the Little Missouri River.

State has not abandoned these grounds,[3] at the direction of the district court, it amended its complaint to add an assertion of federal jurisdiction under 28 U.S.C. 1346(f), to claim a waiver of sovereign immunity under 28 U.S.C. 2409a (Quiet Title Act), and to claim the bed of the Little Missouri River. J.A. p. 13.

At a one-day trial on December 15, 1980, the State offered evidence that the Little Missouri River was navigable. The evidence included the report of a trapper who descended the river by canoe in 1804 with a load of furs, and met Lewis and Clark at the mouth of the river. Several other examples of commercial navigation were shown, including a report that Theodore Roosevelt had pursued boat thieves down the river in 1886, and a navigability study done in 1975 by the United States Army Corps of Engineers — a study concluding that the Little Missouri was in fact navigable. Tr. ii-iii.

The Petitioners submitted no evidence on the issue of navigability. Instead, they argued that the twelve year statute of limitations (28 U.S.C. 2409a(f)) barred the State from bringing the action under the Quiet Title Act. The Petitioners suggested that the State had more than twelve year's notice of the claim of the United States because beginning in 1955 a few scattered federal leases, which are formally available to the public, had included small portions of the Little Missouri riverbed. Petitioners also argued that North Dakota officials should have read advertisements published in 1962 in the *Montana Oil Jour-*

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[3]See Respondent's Conditional Cross-petition for Writ of Certiorari, No. 82-132. The State also filed a cross-appeal to the Eighth Circuit contending that its initial assertion of jurisdiction was proper and correct.

nal for the competitive leasing of five riparian oil and gas parcels that included portions of the bed of the Little Missouri.[4]

The District Court did not address the Petitioners' evidence on this point; it ruled that the statute of limitations contained in the Quiet Title Act did not apply to a State seeking to quiet title to its sovereign public trust lands, such as the beds of navigable lakes and streams. The District Court further declared that the Little Missouri River had been a navigable river when North Dakota became a state, Petition App. C, p. 21a & Petition App. D, p. 29; and that title to the bed vested in the State of North Dakota at statehood. Petition App. C., p. 21a and 25a.[5]

The Court of Appeals affirmed, finding that the Little Missouri River was navigable when North Dakota entered the Union. Petition App. A. p. 13a. The Court of Appeals also affirmed the District Court's ruling that the statute of limitations in the Quiet Title Act does not apply to states seeking to protect their title to sovereign public trust lands. *Id.* at 9a.

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[4]In addition, the petitioners offered two letters written to the State. Neither letter was written by a person having authority to claim the riverbed on behalf of the United States (one was written by a private attorney); the letters were addressed to state agencies that had no authority over riverbed lands at the times the letters were written; and neither letter specifically informed the State that the United States was claiming ownership of the riverbed. Finally, the letters were written before any genuine dispute existed; until oil and gas were discovered, the theoretically inconsistent claims of ownership had little practical effect.

[5]Portions of the Little Missouri River flow along and through the Fort Berthold Indian Reservation. The lower courts did not address title to these portions, nor does this brief.

SUMMARY OF ARGUMENT

1. This suit concerns a narrow class of legally unique lands, a class that has its origin in the rule that certain tidal lands were reserved for the King. After the Revolutionary War, the thirteen original states fell heir to the tidal lands previously owned by the Crown. As additional states joined the Union, the constitutional Equal Footing Doctrine assured these states ownership of similar lands within their borders. These lands — eventually defined to include all lands lying beneath navigable waters — are held by the states in trust, to be preserved for navigation, commerce, fishing, and the like. Sovereign public trust lands may not be alienated wholesale or otherwise used for purposes inconsistent with the trust.

The Petitioners in this case argue, however, that the State's sovereign public trust lands may be alienated inadvertently, that the trust may be forfeited to enforce a federal statute of limitations. A rule allowing the United States to acquire state public trust lands by operation of a statute of limitations runs counter to more than a century of Supreme Court decisions emphasizing that the Equal Footing Doctrine and the states' sovereign control over lands of this sort are protected against federal intrusion by the Constitution itself.

There is no need to decide in this case, however, whether Congress has the constitutional power to take sovereign public trust lands from a state by means of a limitations period or other forfeiture. At the very least, Congress should not be presumed to intend an action so inimical to principles of federalism in the absence of a clear legislative statement. Requiring a clear statement of Congress's intent to limit state control of public trust lands is consistent with this Court's rulings in eleventh amendment and spending power cases and with the longstanding rule that a statute of limitations does not run against a sovereign without a clear expression of legislative intent.

2. Viewed in this light, the limitations provision on which Petitioners rely is a weak reed.

a. Even if the Quiet Title Act, 28 U.S.C. 2409a, offered the only available avenue for judicial relief, its limitations provision would not apply to the narrow class of suits brought by states to vindicate their title to sovereign public trust lands. Congress demonstrated no intent to cut off state remedies or to overturn the traditional rule that states are bound only by statutes of limitations that expressly include them. The statute and the legislative history are silent; such clues as may be found in the legislative history suggest no intent to bind States to the Act's statute of limitations. Without more, the statute must be construed in a manner consistent with principles of federalism.

b. In any event, the Quiet Title Act is not the only avenue by which a suit of this sort may be brought. The Act is a waiver of federal sovereign immunity; it expands the opportunity to sue the United States by name. The twelve year limitations period contained in the Act is at most a condition on the Act's waiver. It does not limit suits made possible by other exceptions to sovereign immunity. The Petitioners argue that the Act is the only applicable exception. If this were so, then before enactment of the Quiet Title Act, the states' right to control their sovereign public trust lands would have been wholly unenforceable; sovereign immunity would have barred any suit to prevent federal interference with those lands.

i. This remarkable notion is wrong. A recognized exception to the doctrine of sovereign immunity permits injunctive suits against federal officers who have interfered with property rights in violation of the Constitution. Petitioners' efforts to take control of the State's sovereign public trust lands violate the constitutional principles of federalism and state sovereignty embodied in the Equal Footing Doctrine. The State has sought prospective injunctive relief to prevent future acts in violation of these principles; it has not sought damages, a disgorging of

past lease fees, or other retrospective relief. Thus, this suit has a basis quite independent of the Quiet Title Act and quite free of the Act's limitations period. Nothing in the Act or the legislative history suggests an intent to limit this independent basis for suit.

ii. Similarly, the 1976 amendments to the Administrative Procedure Act waive sovereign immunity for all injunctive actions against the United States unless some other statute "expressly or impliedly forbids the relief that is sought." 5 U.S.C. § 702. Petitioners contend that the Quiet Title Act expressly or impliedly bars this action; in fact, neither the Act nor its history contains a hint that Congress intended to forbid relief in a case of this sort.

ARGUMENT

1. Application Of The Statute Of Limitations Represents An Unwarranted Intrusion On The Long-Established Constitutional prerogatives Of The States

It was established as early as 1842 that the thirteen original states own the beds of navigable tidal waters within their borders. *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367 (1842).[6] Three years later, the rule was extended by the "Equal Footing Doctrine" to all states.[7] *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845). In *Weber* v. *Board of Harbor Commissioners*, 85 U.S. 57 (1873) this Court stated:

> Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters.

---

[6]The Court in *Martin* held that tidal and submerged lands beneath navigable waters passed from the British Crown and vested in the original thirteen states after the American Revolutionary War. The states did not surrender these lands to the federal government under the Constitution; these lands were reserved, subject only to the paramount right of the federal government to protect navigation.

State ownership of the beds of navigable waters can be traced to Roman law. *See Dig. Just.* 43.12.3; as well as 43.12.1.7; 43.12.1.9; 43.12.1.14; 41.1.30.3; 7.4.24; 40.1.30.1. *See also Inst. Just.* 2.1.3. Under English common law, title to the foreshore was considered *prima facie* in the king. *M. Hale, De Jure Maris Et Brachiorum Ejusdem*, Cap. IV (Circa 1867).

[7]This doctrine provides that states admitted to the Union have the same sovereignty, jurisdiction, and absolute title over sovereign lands as do the original states because they were admitted on an "equal footing" with the original states. *See United States* v. *Texas*, 339 U.S. at 716 (1950), and *Shively* v. *Bowlby*, 152 U.S. at 26-31 (1894).

Id. at 65-66. Somewhat later, this Court expanded State sovereignty to cover the lands beneath all navigable waters, whether tidal or not. *See Barney* v. *Keokuk*, 94 U.S. 324 (1876); *The Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443 (1881).

Numerous efforts to expand federal control over these lands have been turned back, both by the Supreme Court, *see*, e.g., *Pollard's Lessee* v. *Hagan*, *supra*, and by the Congress. *See* Submerged Lands Act, 43 U.S.C. §§ 1301 *et seq.*[8] After statehood, this Court has held, the federal government has no authority to transfer these lands. *Goodtitle* v. *Kibbe*, 50 U.S. (9 How.) 470, 478 (1850). Even before statehood, the federal government holds these lands only "in trust for the future States." *Shively* v. *Bowlby*, 152 U.S. 1, 49 (1894).[9]

Indeed, after statehood the lands are still "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Illinois Central R.R.* v. *Illinois*, 146 U.S. 387, 452 (1892). This means that a state may not surrender its public trust lands wholesale to others. While a few parcels may be conveyed for purposes consistent with the trust, "[a] grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation." *Id.* at 453.

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[8]The statehood Enabling Act for North Dakota expressly provides that the State enters into the Union on an "equal footing" with the original states. Enabling Act, ch. 180, § 7, 25 Stat. 676 (1886).

[9]*See also Montana* v. *United States*, 450 U.S. 544 (1981) (suit by United States on behalf of the Crow Tribe concerning land supposedly granted them under treaty presented no "public exigency" which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States).

The states' authority to administer this trust is a valued "attribute of the sovereignty of the State." *United States* v. *Mission Rock Co.*, 189 U.S. 391, 404 (1903). State control of these lands is protected against federal interference not only by the Tenth Amendment's guarantee of federalism,[10] but also by the constitutional Equal Footing Doctrine. As stated in *Oregon ex rel. State Land Board* v. *Cervallis Sand & Gravel Co.*, 429 U.S. 363 (1977):

> [U]nder *Pollard's Lessee* the State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land titles is concerned.

Id. at 374 (1977).

Once these lands have passed to the state at statehood under the Equal Footing Doctrine, they are governed by state law: "if the lands at issue did pass under the equal footing doctrine, state title is not subject to defeasance and state law governs subsequent dispositions." *Id.* at 378.[11] Federal law is ordinarily

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[10] *See National League of Cities* v. *Usery*, 426 U.S. 883 (1976); *Fry* v. *United States*, 421 U.S. 452, 457 n.7 (1975); *Metcalf & Eddy* v. *Mitchell*, 296 U.S. 514, 523 (1926).

[11] The United States cites *Lassen* v. *Arizona Highway Dep't*, 385 U.S. 458 (1967), for the proposition that lands *granted* to the states by Congress are "equally 'sovereign' lands held in trust." This misses the point. The long line of equal footing doctrine cases, *supra*, and the state land grant cases (e.g., *Utah* v. *Andrus*, 446 U.S. 500 (1980); *Lassen, supra; Ervien* v. *United States*, 251 U.S. 41 (1919)) do not deal with similar subjects. Congressional land grants were made by Acts of Congress and carved out of property that was once federal public domain, and would have remained public domain but for the grants. The right of Congress to place conditions on grants of such lands has long been recognized, as has the right of the federal government to see that any conditions are honored. *Lassen, supra*, at 585. In contrast, the constitutional Equal Footing Doctrine vests states automatically with title to the beds of navigable waters.

inapplicable: "the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law." *Id.* at 370-71.

There is no doubt that the bed of the Little Missouri passed to the state under the Equal Footing Doctrine. Two lower courts have found that the Little Missouri River was navigable at statehood. Petitioners did not challenge that finding in the questions they presented to this Court; thus, it must stand.

For this reason, one would expect state law, including the state statute of limitations, to govern the substance of disputes over the disposition of the Little Missouri riverbed. The law of North Dakota is entirely adequate to resolve the present dispute; it provides that title to these lands is held in trust for the public, *United Plainsmen Association* v. *North Dakota State Water Conservation Commission,* 247 N.W.2d 457, 461 (N.D. 1976), and it underscores the importance of that trust by prohibiting the use of adverse possession to divest the State of public lands: "No claim for the occupation, cultivation, or improvement of any public lands shall ever be recognized." N.D. Const. Art. IX, § 9.

Petitioners, however, urge that Congress overrode these provisions in 1972 when it enacted the Quiet Title Act. 28 U.S.C. § 2409a. By reason of this Act, Petitioners contend, lands that the State lacks authority to convey voluntarily can be stripped away without the State's consent or even its knowledge. If this were so, the states' regulation of land titles within its boundaries — one of the most traditional and integral of State functions — would be severely disrupted as the facts of this case demonstrates. Many private owners still hold land along the Little Missouri River. The federal government acquired most of its lands along the Little Missouri by purchasing the lands from other private landowners. If Petitioners' arguments were

adopted, federal landowners would hold the Little Missouri riverbed free from State claims. Private landholders, in contrast, would be required to treat the Little Missouri as a navigable stream whose riverbed belongs to the State, for private landowners cannot claim the special privilege of imposing a statute of limitations upon the State. And this patchwork of trust and non-trust lands would not be the worst of the confusion; that would come later, when currently private lands would be acquired by the federal government and when currently private lands would be sold or leased by the federal government to private parties who cannot claim the benefits of the Quiet Title Act's limitations provision. Whether the protection of the Quiet Title Act's limitation period extends to such acquisitions is a question that would require new waves of litigation.

While one may doubt Congress's power to cause such mischief in an area traditionally reserved to the states, the Court need not reach that question in this case. A close look at the Quiet Title Act is enough. In interpreting federal statutes that appear to trench deeply on state prerogatives, this Court has required that Congress express an unmistakable intent to do so. Thus, where Congress has not expressly subjected states to federal damages liability, this Court has refused to find a waiver of the states' Eleventh Amendment immunity. *See, e.g., Employees* v. *Department of Public Health & Welfare,* 411 U.S. 279 (1973) (federal law authorizing suit for double damages against "any employer" did not authorize damages suits against states). In another context, this Court declared that, while Congress may use its spending power to induce states to follow the federal lead, "if Congress intends to impose a condition on the grant of public moneys, it must do so unambiguously." *Pennhurst State School & Hospital* v. *Halderman,* 451 U.S. 1, 17 (1981).

In other contexts close to the present case, this Court has also demanded unambiguous language before it would divest states

of their authority over public lands. For example, as discussed below, the Court has held that statutes of limitation do not ordinarily run against a state unless expressly made applicable to it. *See, e.g., Weber* v. *Board of Harbor Commissioners,* 85 U.S. 57, 70 (1873). Moreover, in deciding whether other kinds of federal actions, such as conveyances made before statehood, can divest a state of public trust lands, this Court has refused to infer divestiture "unless the intention was definitely declared or otherwise made very plain." *United States* v. *Holt State Bank,* 270 U.S. 49, 55 (1926); *see also Martin* v. *Waddell,* 41 U.S. (16 Pet.) 366, 410 (1842) (grants of public trust lands to be inferred only if "clear and especial words are used").

These principles were summarized most recently in *Montana* v. *United States,* 450 U.S. 544, 552 (1981). In discussing the authority of the United States to convey territorial lands beneath navigable waters, the Court noted a strong presumption against such conveyances:

> [B]ecause control over the property underlying navigable waters is so strongly identified with the sovereign power of government,... it will not be held that the United States has conveyed such land except because of "some international duty or public exigency"....A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States....

The Court held that this presumption was not overcome even by a treaty declaring that a particular Indian reservation "shall be . . . set apart for the absolute and undisturbed use and occupation" of the tribe, and that no non-Indians other than federal officials "shall ever be permitted to pass over, settle upon, or reside in" the reservation; this language was held insufficient to convey lands located beneath navigable waters within the reservation. *Id.* at 554-57.

As the next section demonstrates, when it enacted the Quiet Title Act, Congress expressed no intent to limit state control of sovereign public trust lands. In the absence of clear language demonstrating congressional intent to intrude so far upon state sovereignty, the Act's limitations provision should not be construed to forfeit the State's ability to protect these lands.

II.

THE LIMITATION PROVISION OF THE QUIET TITLE ACT MAY NOT BAR A STATE FROM ACTING IN ITS SOVEREIGN CAPACITY TO PROTECT ITS PROPERTY RIGHTS TO SOVEREIGN PUBLIC TRUST LAND.

A. The Limitations Provision Is Not Applicable To The State.

1. In seeking a Congressional authorization for the forfeiture they propose, the Petitioners begin with the familiar argument that the doctrine of sovereign immunity requires the consent of the United States before any suit may be brought against it. The State, in amending its original complaint, brought its action pursuant to the Quiet Title Act which contains a waiver of sovereign immunity by the United States. The Petitioners further assert that Congress may attach conditions (such as a statute of limitations) to any waiver of sovereign immunity and that these conditions must be strictly construed.[12]

The Petitioners argue that a statute of limitations[13] provision governs a sovereign state just as it would any ordinary citizen.[14]

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[12]Pet. Br., p. 25.

[13]28 U.S.C. 2409a(f).

[14]The Petitioners cite a number of cases for the proposition that a statute of limitations is an enforceable condition to the waiver of sovereign immunity. Pet. Br.,p. 25. All of these cases, however, are easily distinguishable on the facts from the present action.

Pet. Br., p. 25-26. While that may be true in some instances, in this action the State is not acting as an ordinary citizen since it seeks to quiet title to sovereign public trust lands. Therefore, the rule *quod nullum tempus occurrit regi* is applicable.

Under the *nullum tempus* rule the defenses of statute of limitations and laches may not be asserted against a sovereign. *Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 134 (1938). Further, in *Weber* v. *Board of Harbor Commissioners,* 85 U.S. (18 Wall.) 57 (1873), this Court ruled that "[s]tatutes of limitations are not . . . held to embrace the State, unless she is expressly designated, or necessarily included by the nature of the mischiefs to be remedied." *Id.* at 70.

The Court explained the rationale for this rule: "The presumption [of rightful possession] to which the statute gives this effect extends ... only against *individual claimants;* their personal interest is supposed to be sufficient to induce vigilance in the enforcement of their claims. *It does not extend against the*

In *United States* v. *Kubrick,* 444 U.S. 111 (1979), a private individual sought monetary damages from the United States in an action brought under the Federal Torts Claims Act. 444 U.S. at 115. In *Soriano* v. *United States,* 352 U.S. 270 (1957), an individual Phillippine resident sought monetary damages from the United States under the Tucker Act. 352 U.S. at 271. Likewise, *Munro* v. *United States,* 303 U.S. 36 (1938), involved a claim against the United States by an individual citizen under the Tucker Act. 303 U.S. at 36-37.

Two other cases cited by the Petitioners, *Finn* v. *United States,* 123 U.S. 227 (1887) and *Kendall* v. *United States,* 107 U.S. 123 (1882), involved individual citizens suing the federal government for monetary claims in the United States Court of Claims. 123 U.S. at 227-28, 107 U.S. at 124. Finally, *Nichols* v. *United States,* 74 U.S. (7 Wall.) 122 (1868), involved a suit by an unhappy merchant for the refund of custom duties in the Court of Claims. 74 U.S. at 123.

All the cases cited by the Petitioners for the proposition that a statute of limitations is an enforceable waiver condition involved private individuals suing the federal government for *monetary* claims. This case, on the other hand, involves an action by a state acting in its sovereign capacity to protect its title to sovereign public trust lands.

State, which acts through numerous agents, having no such incentive to prosecute her claims." Id. (emphasis supplied). The application of this rationale alone makes the statute of limitations (28 U.S.C. 2409a(f)) inapplicable to the present action.

The Petitioners note that the Quiet Title Act makes no express mention of states as plaintiffs. The Petitioners correctly state that this omission should not exclude a state from claiming the benefits of the Quiet Title Act, just as this omission does not bar states from seeking relief under the Administrative Procedure Act or the Tucker Act. Pet. Br., p. 24. The State, however, has never argued that an Act must expressly mention a state before a state is subject to the Act. Nor does the *Weber* rule stand for this proposition. Rather, *Weber, supra,* held that *statutes of limitations* do not apply unless states are expressly included. 85 U.S. at 70. The case does not speak to entire Acts—such as the Quiet Title Act.[15]

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[15]The Petitioners assert that every court, with the exception of the court below and one district court, has applied the limitations provision to a suit by a state against the United States. Pet. Br., p.26. The State, however, contends that these decisions are inapposite either because the statute of limitations was not specifically an issue or because the case is easily distinguishable on the facts.

United States v. *Louisiana,* 127 U.S. 182 (1888), involved a monetary claim by the State of Louisiana for five percent of the net proceeds from the sale of federal land by the federal government. 127 U.S. at 182. Moreover, Louisiana's right to the proceeds of the sale did not arise from any sovereign title in Louisiana but rather under a congressional act which was enacted in order to provide swampland reclamation and road construction funds for the developing states. *Id.* at 182-83. Also, the statute of limitations, Rev. Stat. § 1069 (1887) (repealed 1911), applied in *Louisiana,* was a general statute limiting the jurisdiction of the Court of Claims. In this case, however, the applicable statute, 28 U.S.C. 2409a, *et seq.,* limits causes of action rather than court jurisdiction to hear those actions. Court of Claims jurisdiction is limited to *claims,* usually monetary damages, against the United States. See 28 U.S.C. 1491. The State in the present action is seeking to protect its title to sovereign public trust lands by enjoining the Petitioners from interfering with the State's exercise of its

The Court of Appeals properly noted that "special implications" relating to the applicability of Section 2409(a)(f) existed in this case because the State brought suit in its sovereign capacity rather than its proprietary capacity to protect its sovereign ti-

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sovereign rights to this land. The State is not litigating a claim for money damages. Therefore, this suit would be outside the jurisdiction of the Court of Claims primarily because an injunction is sought and not because the six-year limitations bar of the present day equivalent of §1069, 28 U.S.C. 2501, applies. *Louisiana,* therefore, is simply inapposite since no title to sovereign trust land was in dispute nor was the statute of limitations applied to a sovereign state attempting to protect those lands.

In *California* v. *United States,* 132 F. Supp. 208 (Ct.Cl. 1955), the Court stated that the six-year statute of limitations under the Tucker Act applied to a state. *Id.* at 211. However, the Court's jurisdiction was based on the Tucker Act and this suit, like *Louisiana,* was also brought to recover a monetary claim. Significantly, in *California,* the United States possessed a recorded deed to the land in question. California challenged the validity of the United States' deed based on the principle that the adverse possession doctrine does not apply as against a sovereign state. *Id.* at 209. California did not, however, challenge the validity of the statute of limitations as applied to the state. In the present suit, on the other hand, North Dakota seeks to protect its title to its sovereign land rather than press a claim for monetary damages. Also, no deed nor body of subsequent law exists in the present case showing any color of title in the United States.

In *Park County, Montana* v. *United States,* 626 F.2d 718 (9th Cir. 1980), *cert. denied,* 449 U.S. 1112 (1981), the District Court and Court of Appeals agreed that the limitations provision of the Quiet Title Act applied to Park County because it had failed to show that it enjoyed a different status from other litigants under 28 U.S.C. 2409a(f). *Id.* at 720. However, in the present case it is a sovereign state acting in its sovereign capacity which is seeking to avoid the limitation of Section 2409a(f). A sovereign state has a fundamentally different status than a county, which is not a sovereign but is merely a creature of a state having a status much like a corporation. As such, counties do not possess the same privileges and immunities as sovereign states. See, e.g., *Quern* v. *Jordan,* 440 U.S. 332 (1979); *Monell* v. *Dep't. of Social Services of New York,* 436 U.S. 658 (1978); *Edelman* v. *Jordan,* 415 U.S. 651 (1974).

tle to public trust lands. Petition App., p. 5a. See discussion of the Equal Footing Doctrine, Part I, *supra*. Because the State's title to these public trust lands is conferred by the Constitution,

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Also, *Park County* was a suit by a county claiming a road easement within the boundaries of a national forest, not a suit to protect title to sovereign public trust lands. Therefore, it is clear that the State of North Dakota, unlike Park County, enjoys a status different from other litigants under Section 2409a(f) when it acts as a sovereign seeking to protect its title to public trust lands. The court below did not reject the holding in *Park County*, but merely distinguished it from this case based on the fundamentally different lands and plaintiffs involved.

As to *Nevada* v. *United States*, 628 F.2d 1357 (9th Cir. 1980)(table), *cert. denied*, 450 U.S. 995 (1981), the decision is unpublished and therefore it has no value as authority for any proposition of law. The *Nevada* decision came out of the Ninth Circuit where, under Rule 21(c) of the United States Court of Appeals for the Ninth Circuit, a decision "which is not for publication shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders . . . ." Therefore, the Nevada decision has no precedential value in the Ninth Circuit. The Eighth Circuit also disclaims any precedential value in unpublished opinions. See Petition App. A, p. 9a.

Even if *Nevada* had any value as authority, the case is inapposite because the United States claimed the land in question as Indian land. The Quiet Title Act specifically excepts "trust or restricted Indian lands" from the waiver of sovereign immunity. 28 U.S.C. 2409a(a). In *Nevada*, the suit was dismissed on this basis. As an alternative ground, the Court of Appeals stated that the suit was also barred by the twelve-year statute of limitations. However, this was mere dicta because the State of Nevada did not challenge the applicability of Section 2409a(f) to its claim.

Finally, *United States* v. *422,978 Square Feet of Land*, 445 F.2d 1180 (9th Cir. 1971), is distinguishable for two reasons. First, California sought monetary compensation under the Tucker Act for the land taken by the United States. *Id.* at 1188. Second, the United States seized the land in this case for navigational purposes. *Id.* at 1186. Therefore, this case does not involve a sovereign state seeking to protect its title to public trust lands. Furthermore, the federal government has never claimed in the present action that it seeks title to the land in issue for navigational purposes.

these lands have a fundamentally different character than lands merely held in a proprietary capacity by a state or the federal government. *Illinois Central R.R.* v. *Illinois,* 146 U.S. 387, 452-55 (1892).

The federal title asserted by the Petitioners, in contrast, is largely based on its purchase of riparian lands from private landowners. The State, on the other hand, brought this action in its sovereign capacity pursuant to the constitutional Equal Footing and Public Trust Doctrines; this capacity is established by the unique character of the lands involved.

This Court has stated that "waivers by Congress of governmental immunity . . . should be liberally construed" when the federal government is acting in a proprietary capacity. *Federal Housing Administration* v. *Burr,* 309 U.S. 242, 245 (1940). See also, *National City Bank of New York* v. *Republic of China,* 348 U.S. 356, 359 (1951); *United States* v. *Yellow Cab Co.,* 340 U.S. 543, 550 (1951). The State asserts that just such a liberal construction of the sovereign immunity waiver is required in this action.

The Petitioners claim that the present controversy involves two unequal sovereigns. Pet. Br., p. 27. The Petitioners argue that the federal government is acting as a superior sovereign in this action because it seeks to invoke a statute of limitations defense as a condition to a sovereign immunity waiver. The Petitioners, however, ignore the capacity of the parties. In this controversy, the State, based on the Equal Footing Doctrine, Public Trust Doctrine, and Submerged Lands Act, is the party acting in a sovereign capacity (protecting sovereign public trust lands) while the Petitioners are fulfilling merely a federal proprietary function (managing acquired federal land for multiple use). Indeed, this action does involve two unequal sovereigns; a sovereign state acting in its sovereign capacity and the Federal

Government merely acting in its proprietary capacity.[16] Therefore, the applicable rule in this action is drawn from *Weber, supra,* and *United States* v. *California,* 332 U.S. 19 (1947) that where "public trust" lands are concerned, a sovereign cannot be barred by laches or statute of limitations from suing to assert or protect title. *Weber,* 85 U.S. at 71; *California,* 332 U.S. at 39-40.

Because North Dakota, acting in its sovereign capacity, is seeking to quiet title to its constitutionally conferred public trust lands, the statue of limitations provision, Section 2409a(f), of the Quiet Title Act does not apply in this action.

2. The Petitioners assert that the applicability of the Quiet Title Act to this controversy is an all or nothing proposition. They assert that the State is not uniquely free to discard the burdens of the Act while claiming its privilege. Pet. Br., p. 28. The Petitioners, however, ignore both the statutory organization of Section 2409a and the legislative history of the Act. A basic rule of statutory construction is that a statute should be read as a whole, with effect given to each of its parts whenever possible. E.g., *Weinberger* v. *Hynson, Westcott & Dunning, Inc.* 412 U.S. 609, 631-32 (1973).

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[16]The Petitioners cite *Sanitary District of Chicago* v. *United States,* 266 U.S. 405 (1925), for the proposition that a dispute between the United States and a state is a dispute between unequals. Pet Br., p. 27. The issue in *Sanitary District* was whether the State of Illinois could divert water from Lake Michigan in a manner that threatened the viability of the Great Lakes System. 266 U.S. at 423-24. In resolving the issue in favor of the federal government, this Court stated that the United States was "asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction." *Id.* at 425. The State realizes that the United States has broad powers under the Commerce Clause of the Constitution and paramount power to protect the right of public navigation. In the present action, however, neither the Petitioners nor the United States has made a claim to the Little Missouri River based on a navigational servitude or the Commerce Clause; indeed, in such instance, one would expect Petitioners and the United States to advocate a ruling of navigability. Rather, in this case, the federal government's interest in the river is purely proprietary and nonregulatory.

Section 2409a(a) of the Quiet Title Act is a general waiver of sovereign immunity by the United States with exceptions as to trust or restricted Indian lands. In the following subsections, however, the focus of the statute turns from the United States to the party bringing the suit. The State agrees that each of the following subsections is a limitation on the United States' waiver to suit. But each of these limitations must be construed separately. Based on this statutory organization and seemingly separate focus of the different subsections it is entirely reasonable that a sovereign state be included under the general waiver of immunity subsection while it need not be included under the other subsections.

For example, §2409a(b) provides that if the final determination in a suit brought under the Quiet Title Act is adverse to the United States, the United States may nevertheless retain possession of the real property involved upon payment of just compensation to the displaced party. Petitioners assert that this subsection also applies to states. Pet. Br., p. 32. If so, this subsection silently overrides the traditional rules that states hold constitutionally derived title to the beds of navigable waters and that the United States merely held pre-statehood title in trust for future states and their citizens. In *Montana* v. *United States,* 450 U.S.544 (1981), this Court discusses the established exception to the equal footing doctrine that allows Congress to convey territorial trust lands below navigable waters. *Id.* at 551, citing *Shively* v. *Bowlby,* 152 U.S.1, 48. Under this narrow exception, Congress is presumed to convey this trust land only to meet "some international duty or public exigency." 450 U.S. at 552. It follows that any application of §2409a(b) which would allow the United States to retain possession of state sovereign public trust lands upon mere payment of just compensation would be contrary to this presumption unless such retention of possession was based on some specific international duty or public exigency. Petitioners have not demonstrated any international duty, public exigency,

or unambiguous statement of Congressional intent to override state authority over sovereign public trust land.[17]

In Subsections 2409a(b), (c), (d), and (f) references are made to the following: "person," Subsection 2409a(b); "plaintiff," Subsection 2409a(c), (d), and (f); and "predecessor in interest," Subsection 2409a(f). No such references are made in Subsection 2409a(a). Therefore, since a logical division occurs between the general waiver of sovereign immunity under Subsection 2409a(a) and the specific conditions of the waiver listed in Subsections 2409a(b)-(g), and since Subsections 2409a(b), (c), (d), and (f) refer to three different parties, this Court should consult the legislative history of the statute in order to determine the application of each separate subsection.

The legislative history of Section 2409a(f), H.R. Rep. No. 92-1559, refers to "persons," "citizens," and "individual citizens" but it does not at any point refer to "states." H.R. Rep. No. 1559, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4547, 4547-52. In a relevant situation, this Court has stated that "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." *Wilson* v. *Omaha Indian Tribe,* 442 U.S. 653, 667 (1979), citing *United States* v. *Cooper Corp.,* 312 U.S. 600, 604 (1941). Although these cases involved the construction of statutes, there is no reason why this principle should not apply to legislative histories as well. Also, this Court has noted the absence of references to states in a legislative history and has stated that "[w]e can only conclude that this silence on the matter is itself a significant indication of legislative intent. . . . ." *Quern* v. *Jordan,* 440 U.S. 332, 343 (1979).

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[17]Section 2409a(b) refers to "persons" which, in common usage, does not include the sovereign. *See Wilson* v. *Omaha Indian Tribe,* 442 U.S. 653, 667 (1979). Therefore, §2409a(b) clearly does not include a sovereign state.

Significantly, the Quiet Title legislation itself is the result of a title dispute between a private landowner and the United States. *California* v. *Arizona,* 440 U.S. at 67, n. 7. Furthermore, as originally drafted, Section 2409a(a), the sovereign immunity waiver, stated that "[t]he United States may be named a party in any civil action brought by *any person* to quiet title to lands claimed by the United States." *Id.* (emphasis supplied). The "any person" phrase was subsequently deleted. The deletion of this phrase is evidence of congressional intent to include the states in the waiver of sovereign immunity subsection (2409a(a)). Therefore, since the legislative history of Section 2409a(f) refers specifically to "persons," the statute of limitations itself was intended by Congress to cover only stale claims by private individuals and not state claims to sovereign public trust lands. This is especially true when the Equal Footing Doctrine and the Submerged Lands Act are considered in this analysis.

The Petitioners refuse to accept the Court of Appeals' conclusion that the Submerged Lands Act is relevant to the present discussion of congressional intent. Pet. Br., p. 28 n. 18. The State, however, asserts that the Submerged Lands Act, including its legislative history, is particularly germane to this analysis. Because the legislative intent of Congress to quiet the title to submerged lands in the states is specifically expressed in the Submerged Lands Act, 43 U.S.C. 1311(a), any attempted reading of the Quiet Title Act to cut short the effect of the Submerged Lands Act and reverse that congressional intent is necessarily relevant to the present controversy.

Congress, by enacting the Submerged Lands Act of 1953, 43 U.S.C. 1301, *et seq.*, confirmed the states' title to the beds of in-

land navigable waters. *Corvallis,* 429 U.S. at 371, n. 4[18] The federal government's policy regarding the beds of navigable waters within state boundaries is stated in Section 1311(a) of the Act. This section provides that "[i]t is determined and declared to be in the public interest that . . . title to and ownership of lands beneath navigable waters, . . . [including] the natural resources within such lands, . . . are . . . recognized, confirmed, established, and vested in and assigned to the respective states. . . ." 43 U.S.C. 1311(a). Section 1311(b) of the Act quitclaims all

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[18]In *Bonelli Cattle Co.* v. *Arizona,* 414 U.S. 313 (1973), this Court states that "[the Submerged Lands] Act merely *confirmed* the states' preexisting rights in the beds of the navigable waterways within their boundaries by, in effect, quit claiming all federal claims thereto." *Id.* at 318 (emphasis supplied). Surely, it would be inconsistent for Congress to reaffirm state title to these lands and then nineteen years later, by enacting the Quiet Title Act, foreclose a state's right to assert title to these lands.

In *California ex rel., State Lands Commission* v. *United States,* ___ U.S. ___, 102 S.Ct. 2432 (1982) this Court alludes to the proposition that while the Submerged Lands Act *confirmed existing* state title to land beneath inland waters based on the Equal Footing Doctrine, the Act actually *granted* state title to land underlying territorial seas within three miles of state coastal boundaries. 102 S.Ct. at 2438. This *granting* of title to coastal submerged land was held to be a constitutional exercise of Congress' power to dispose of federal property. *See Alabama* v. *Texas,* 347 U.S. 272, 273-74 (1954). In *California ex rel., Lands Comm'n,* this Court adhered "to the principle that federal *grants* are to be construed strictly in favor of the United States." ___ U.S. ___; 102 S.Ct. at 2440, citing *United States* v. *Grand River Dam Authority,* 363 U.S. 229, 235 (1960) (emphasis supplied). This principle, however, should have no application to a state seeking to protect its title to sovereign public trust lands within its boundaries. Such lands were not *granted* by Congress to the states, but rather, under the Equal Footing Doctrine, were vested in the states by the Constitution upon their admission to the Union.

"right, title, and interests of the United States" in such land to the respective states.[19]

The motivating factor behind the enactment of the Submerged Lands Act was to end the interminable litigation[20] between the federal and state governments over the title to these submerged lands. See H.R. Rep. No. 215, 83d Cong., 1st Session *reprinted in* 1953 U.S. Code Cong. & Ad. News, 1385, 1386. In other words, the immediate purpose of the Submerged Lands Act was to turn the management of the beds of navigable waters over to the states once and for all.[21] Yet, the Petitioners are seeking a

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[19]Section 1311(b)(1) states in part, "[t]he United States releases and relinquishes unto said States . . . all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources. . . ." *Id.* This language could constitute a disclaimer of interest within the meaning of 2409a(d). *See, W.H. Pugh Coal Co.* v. *United States,* 418 F. Supp. 538 (E.D.Wis. 1976), where the court held that a quit claim deed constituted such a disclaimer.

[20]It is indeed ironic that Congress' avowed purpose in enacting the Submerged Lands Act was to once and for all confirm and establish the rights and claims of the states to the land and resources beneath navigable waters within their boundaries. It was Congress' intention that the "highly developed, experienced, and efficient state organizations" controlling the submerged oil deposits not be destroyed by transferring such resources to the control of a federal bureau. H.R. Rep. No. 1778, 83d Cong., 1st Sess., *reprinted in* 1953 U.S. Code & Cong. Ad. News 1415, 1435. Yet once again this suit finds state and federal bureaus in litigation over the control of these same oil and gas resources.

[21]H.R. Rep. No. 215, 83rd Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Ad. News 1385, 1389, states in part that "[t]he United States relinquishes unto said states . . . all rights, titles, interest . . . to all these lands, moneys, improvements, and natural resources. All claims arising out of past operations in this area are released by the United States." *Id.* A logical implication from this statement is that Congress also intended to release all *future* claims of the United States to these lands. At the very least, this clear expression of congressional intent shows that Congress did not anticipate that the United States would lay claim to any interest in these lands in the future other than within the federal constitutional power to regulate and control these lands. Examples of this federal power are commerce, navigation, national defense, international affairs, and flood control. *Id.* None of these powers have been invoked by the federal government in the present case.

construction of the Quiet Title Act that would clearly conflict with this express congressional intent. An application of Section 2409a(f) of the Quiet Title Act that would bar a state from asserting its title to its sovereign public trust lands would, in effect, allow the Petitioners to circumvent the provisions of the Submerged Lands Act and nullify the avowed congressional intent of that Act, which expressly disclaims United States' interests in the beds of navigable waters within state boundaries.

The Petitioners in this action are attempting to do indirectly what they cannot do directly. The Petitioners are attempting to defeat the legitimate claim of a sovereign state to its sovereign public trust land by administratively claiming such lands and then denying the state a forum for protecting its rightful title. To allow the Petitioners to hide behind this statute of limitations would deny meaning to the Submerged Lands Act, the Equal Footing Doctrine, and the Public Trust Doctrine.[22]

3. Should Section 2409a(f) of the Quiet Title Act govern this case, and should the State be unable to successfully defend

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[22]In *United States* v. *Holt State Bank*, 270 U.S. 49 (1926), this Court stated that the United States' policy regarding territorial trust lands under navigable waters is to refrain from making any disposal of these trust lands except in "exceptional instances when impelled to particular disposals by some international duty or public exigency." *Id.* at 55. This exception to the Equal Footing Doctrine was severely limited by a strong presumption against withdrawal and conveyance of such land by the United States unless Congressional intent to convey or withdraw such lands was very plain. *Id. See also Montana* v. *United States, supra,* 450 U.S. at 552.

Allowing §2409a(f) of the Quiet Title Act to bar a state from asserting title to its public trust lands would, in effect, withdraw such trust lands not merely from a territory, but from an established sovereign state. These public lands would be withdrawn without any consideration of the strong presumption against conveyance or withdrawals and without any federal claim of overriding international duty or public exigency. Surely, Congress did not intend §2409a(f) to reach this far. *See also Goodtitle* v. *Kibbe, supra,* 50 U.S. at 478.

against the "notice" argument, the result would be a forfeiture of North Dakota's public trust lands and a divestiture of the State's title without an adjudication on the merits. Such a restrictive reading of the Quiet Title Act is precisely the kind of federal action impairing basic attributes of sovereign states that is prohibited by the Tenth Amendment as well as the Equal Footing Doctrine.

The Petitioners also assert that within its sphere, the Constitution requires that a dispute between the United States and a state be resolved in favor of the superior sovereign. Pet. p.27. This begs the real question because the United States is the superior sovereign only if it has title to the land. And it has title only if Congress intended to divest states of public trust lands by passage of a statute of limitations. There is no evidence that Congress had such an intent, and if there were, the intended result would be of doubtful constitutionality.

The Quiet Title Act should be read so as to avoid such doubts. For example, this Court, in *California* v. *Arizona*, 440 U.S. 59 (1979), construed the jurisdictional condition in 28 U.S.C. 1346(f) so as to allow the states to bring original actions under section 2409a in the Supreme Court despite the contrary wording of subsection 1346(f). *Id.* at 66-68. In so construing the jurisdictional condition this Court saved the statute and avoided the constitutional problems a more mechanical reading would have caused.[23] This case calls upon this Court to construe another subsection of the Quiet Title Act (2409a(f)) so as save the statute from a constitutional confrontation. This may be done by simply affirming the statutory construction of the lower courts.

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[23]In *California* v. *Arizona*, this Court stated that when the constitutionality of a statute is challenged "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." 440 U.S. at 66, *citing Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

The Petitioners suggest that an "odd" result would occur if Section 2409a(f) were construed to bar a state *statutory* claim to property but not a state *constitutional* claim. If so, the solution should be to resolve the conflict by restricting sovereign immunity; this solution was adopted by Congress in recent amendments to the Administrative Procedure Act (discussed in Part B. below). In any event, the only issue before the Court here is a constitutional claim under the Equal Footing Doctrine. The unauthorized action of a few executive branch officers seeking to assert federal authority over the bed of a navigable river violated the constitutional entitlements of the State.

B. There Are Independent Grounds For Jurisdiction

The petitioners have jointly and severally interfered with the State's sovereign title to the bed of the Little Missouri River. The State secured a declaratory judgment of navigability under 28 U.S.C. § 2201. As previously stated, the issue of navigability is a federal question giving federal courts subject matter jurisdiction under 28 U.S.C. § 1331. *United States* v. *Oregon*, 295 U.S. 1 (1935). This action alone established title in the State; the petitioners, having failed to appeal that portion of the judgment, are forclosed from disputing the same. In addition, the State secured an order requiring the petitioners to cease and desist from interfering with the State's title. Where a federal question is raised such an action is clearly permissible under 5 U.S.C. §702 and under court decreed exceptions to the sovereign immunity doctrine.[24]

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[24] *Jaffee* v. *United States*, 592 F.2d 712 (3rd Cir. 1979), *cert. denied*, 441 U.S. 961 (1979), *See also, Sheehan* v. *Army and Air Force Exchange Services*, 619 F.2d 1132, *reh'g denied*, 627 F.2d 239 (5th Cir. 1980), *rev'd on other grounds*, ___ U.S. ___, 102 S.Ct. 88 (1982); *Warin* v. *Dep't. of Treasury*, 672 F.2d 590 (6th Cir. 1982); *Schnapper* v. *Foley*, 667 F.2d 102 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 1448 (1982); *Hill* v. *United States*, 571 F. Supp. 1098 (9th Cir. 1978); *City & County of Denver* v. *Bergland*, 517 F. Supp. 155 (D. Col. 1981); *University of Maryland* v. *Cleland*, 516 F. Supp. 448 (D. Md. 1981);

The declaratory judgment of navigability confirmed that the State was granted absolute title to the bed of the Little Missouri at statehood in 1889 pursuant to *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845), under the Equal Footing Doctrine.[25] The Petitioners offered no evidence to dispute navigability and have not appealed that ruling. Yet the only legal, equitable, or moral claim through which the Federal government could claim title would be if the river were not navigable. The real dispute concerns a tortious interference with the State's use and enjoyment of its property; title is not in dispute and need not be quieted under 28 U.S.C. § 2409. Instead, the State wishes to enjoin Federal officers from interfering with the State's property; thus, the issue is possession, not title. The State contends that any necessary waiver of sovereign immunity apart from the Quiet Title Act is established by existing case law, by 28 U.S.C. §1361 (mandamus), and/or by 5 U.S.C. §702 (judicial review provisions of the Administrative Procedure Act).[26]

Collyard v. *Washington Capitals*, 477 F. Supp. 1247 (D. Minn. 1979); and *Illinois, ex rel. Scott* v. *Hoffman*, 425 F. Supp. 71 (S.D. Ill. 1977) (navigable waters). The federal defendants have argued that relief is not available under 5 U.S.C. 702 because of the language forbidding relief "if any other statute that grants consent to sue expressly or implicitly forbids the relief which is sought." The federal defendants cite the statute of limitations found in 28 U.S.C. 2409a(f) (Quiet Title Act) as such a statute. This argument is erroneous because the original action was not an action to quiet title, but was an action for a declaratory judgment of navigability; the issue of navigability is a federal question.

Several courts have held that 28 U.S.C. 1361 (mandamus) provides a waiver of sovereign immunity to force a federal official to perform a duty owed the plaintiff—in this case the duty is not to interfere with the State's property. *Westinghouse Elec. Corp.* v. *Schlesinger*, 542 F.2d 1190 (4th Cir. 1976); *Roaring Springs Assoc.* v. *Andrus*, 471 F.Supp. 522 (D. Or. 1978); *NAACP* v. *Levi*, 418 F.Supp. 1109 (D.D.C. 1976).

[25] *See, supra*, Part I of the text for discussion of the Equal Footing Doctrine.

[26] Of course, by way of its previous arguments, the State contends that such waiver is not needed. See text *supra* Part I.

Application of the doctrine of sovereign immunity to suits for specific relief has been conflicting, and "as a matter of logic it is not easy to reconcile all of them."[27] *Land* v. *Dollar*, 330 U.S. 731, 738 (1947). However, the landmark case of *United States* v. *Lee*, 106 U.S. 196 (1882), established the proposition that if the possession of the agent of the United States was illegal, the suit against such agents was not a suit against the sovereign; thus, the doctrine of sovereign immunity was not applicable to bar the action. *Id.* at 220-23. This general proposition was narrowed in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682 (1948). The Court distinguished *Lee* and its progeny, holding that:

> [T]he action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within these powers, only if the powers, or their exercise in the particular case, are constitutionally void.

Id. at 701-02.

This rule was applied in *Malone* v. *Bowdoin*, 369 U.S. 643 (1961), again distinguishing *Lee*, finding continuing validity "where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation." *Id.* at 648, *quoting Larson* v. *Domestic & Foreign Corp.*, 337 U.S. at 697. Because respondent made no assertion of a constitutional claim, no assertion that the official was exceeding his delegated powers, or no assertion that he was possessing land in anything other than his official capacity, the suit was dismissed on the grounds that sovereign immunity barred the action. *Id.* at 648.

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[27] "The result of course is a condition of hopeless confusion in judicial opinions, and an invitation to Government attorneys to assert the applicability of the doctrine whenever the opportunity reasonably presents itself." *Knox Hill Tenants Council* v. *Washington*, 448 F.2d 1045, 1059 (D.C. Cir. 1971).

In the present case, the State claims that the Petitioners have interfered with the State's constitutionally conferred title to sovereign lands. In addition, Petitioners' actions are beyond any statutory authority given them by Congress as there is no statute permitting Petitioners to interfere with the State's ownership of the beds of navigable waters. *See, Andros* v. *Rupp.*, 433 F.2d 70 (9th Cir. 1970). Indeed, an Act of Congress, the Submerged Lands Act, 43 U.S.C. 1301, *et seq.*, necessarily implies a congressional mandate not to interfere with the State's title to sovereign public trust lands. Even under the strictest interpretation of the jurisdictional tests in *Larson* and *Malone*, federal courts may decide the merits of this controversy over a defense of sovereign immunity.[28]

As stated in *Larson*, a basic exception to the doctrine of sovereign immunity arises when a federal officer's actions "conflict with the terms of his valid statutory authority." *Larson*, 337 U.S. at 695. 14 Wright and Miller, *Federal Practice and Procedure*, § 3655, at 186-213 (1976); *Doe* v. *United States Civil Service Commission*, 483 F.Supp. 539 (S.D.N.Y. 1980). In *Andros* v. *Rupp*, 433 F.2d 70 (9th Cir. 1970), the Court looked to the individual or entity in whom title was vested. The Court held that since title was in the plaintiff, the sovereign had no statutory authority to control the property. *Compare Malone* v. *Bowdoin*, 369 U.S. 643 (1961); *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682 (1949), (distinguished as cases where record title was in the sovereign).[29] Further, the Court stated that

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[28]Petitioners cite *McClellan* v. *Kimball*, 623 F.2d 83 (9th Cir. 1980)(Pet. Br., p. 23) as denying this theory; however, in that case the court held that the federal official was bound by federal regulations. The Petitioners also cite *Cummings* v. *United States*, 648 F.2d 289 (5th Cir. 1981). This case stands solely for the proposition that one cannot sue the United States in state court when seeking to quiet title.

[29]Here "record title" is not in the United States—not even by implication of being a riparian owner since the Little Missouri River was meandered at the time of the cadastral survey (with the exception of one township). See Defendants' Exhibits D and G, District Court

statutory authority need not be shown to indicate that the defendant had exceeded his powers, for "we know of no statute saying that a government official shall not take private property." 433 F.2d 972. The Court continued "[t]he defendant as a supervisor of property belonging to the United States does not, by definition, have authority to control property which does not belong to the United States." *Id.* at 72. In a similiar case, *Armstrong* v. *Udall,* 435 F.2d 38 (9th Cir. 1970), the circuit court remanded the case for a determination of whether the land in question was included in a patent. Applying *Andros,* the court said that if private title could be shown an action would lie. *Id.* at 42. *See also, Zager* v. *United States,* 256 F.Supp. 396 (D. Wis. 1966).

Professor Wright has stated:

> When property rights of the government are challenged, the Court, despite strong scholarly criticism, is now firmly committed to the doctrine that suits, though in form against the officer, are in reality against the United States and thus barred by sovereign immunity, *except in the unlikely circumstance that the officer named as defendant is exceeding his statutory powers in holding the property or that his statutory powers are constitutionally void.*

C. Wright, *Handbook of the Law of Federal Courts,* §22 at 84, (3rd. Ed. 1976) (*emphasis added) See also,* 14 Wright & Miller, *Federal Practice and Procedure,* §3655 at 180-184 (1976). The State submits that this case constitutes the "unlikely circumstance"—a federal officer exercising privileges of owner-

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Record. Since the petitioners have not appealed the decree of navigability, "record title" is now clearly in the State. Moreover, record title should be deemed to be in the State prior to judgment by virtue of the Equal Footing Doctrine and Submerged Lands Act.

ship over a navigable river bed without statutory authority and in defiance of the Equal Footing Doctrine of the Constitution.[30]

In addition to the above case law interpreting sovereign immunity as it applies to specific relief, Congress amended 5 U.S.C. §§ 702 and 703 by Pub.L. 94-574, 90 Stat. 2721 (1976). The legislative history of this provision gives great insight into the reasoning behind the amendment.

After reviewing *Larson* and other leading cases, the House Report concluded:

> The application of sovereign immunity is illogical and one cannot predict in what case the injustice is likely to occur. . . . [T]he time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity. . . . [When the defense is raised,] the sovereign immunity doctrine distracts the court's attention from the basic issue concerning the availability or scope of judicial review.[31]

The House Report states that this amendment was intended "to eliminate the defense of sovereign immunity as to any action in a Federal Court seeking relief other than money damages and stating a claim based on the assertion of unlawful official

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[30]*See, Larson,* 337 U.S. at 695. *See generally, Andrus* v. *Charleston Stone Products Co.,* 436 U.S. 604, 608, n. 6 (1978); *Doria Mining & Eng'g Corp.* v. *Morton,* 608 F.2d 1255, 1257 (9th Cir. 1979), *cert. denied sub nom., California* v. *Doria Mining & Eng'g Corp.,* 445 U.S. 962 (1980); and *Fort Sumter Tours, Inc.* v. *Andrus,* 564 F.2d 119, 1123, n. 4 (4th Cir. 1977). The fact that this action seeks declaratory and injunctive relief does not prevent it from being maintained. *See, e.g. United States* v. *Lee,* 106 U.S. 196 (1882); *American Federation of Government Employees, Local 1858* v. *Callaway,* 398 F. Supp. 176 (N.D. Ala. 1975); *Lombard Corp.* v. *Resor,* 321 F. Supp. 687 (D.D.C. 1970).

[31]H.R. Rep. No. 1656, 94th Cong., 2d. Sess. 8-9, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6121, 6128—30.

action ..." H.R. Rep. No. 1656, 94th Cong., 2nd Sess., 2 reprinted in 1976 U.S. Code Cong. & Ad. News 6121, 6122." *Warin* v. *Director, Department of the Treasury*, 672 F.2d 590 (6th Cir. 1982), held that "the amended 5 U.S.C. § 702 operates as a waiver of the sovereign immunity defense under [28 U.S.C. §1331]." *Id.* at 591. That Court agreed with other circuits that "have concluded that 5 U.S.C. §702 waives the sovereign immunity defense in actions for monetary relief under section 1331."

It should be noted that 5 U.S.C. §702 retains the defense of sovereign immunity only when another statute expressly or implicitly forecloses injunctive relief. Petitioners argue that the Quiet Title Act, 28 U.S.C. 2409(a), "expressly or impliedly forbids the relief that is sought." Pet. Br. at 24-29. As stated earlier, the actual title to property is not in dispute; that is merely incidental to the real dispute — the Petitioners' interference with the State's right to use and enjoy sovereign public trust land. The State merely seeks to enjoin Petitioners from interfering with such right. As such, the statute of limitations provision of the Quiet Title Act does not apply to limit §702 in this action. Moreover, the intent of the limiting language is §702 may be aimed at statutes that specifically and affirmatively mandate complete sovereign immunity. The congressional intent of §702 was to "eliminate the sovereign immunity defense in all equitable actions for specific relief against a federal agency or official acting in an official capacity."[11] Thus, sovereign im-

[11]It was stated in *Schnapper* v. *Foley*, 667 F.2d 102 that "application of *Larson* [should not] be considered in light of the amendments to 5 U.S.C. §§ 702 and 703. . . ." *Id.* at 107. *Warin* v. *Director, Department of the Treasury*, 672 F.2d 590 (6th Cir. 1982), *citing Jaffee* v. *United States*, 592 F.2d 712 (3rd Cir. 1979), *cert. denied*, 441 U.S. 961 (1979); *Beller* v. *Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Sheehan* v. *Army & Air Force Exchange Services*, 619 F.2d 1132 (5th Cir. 1980), *reversed on other grounds*, ___ U.S. ___, 102 S. Ct. 88 (1982).

[12]H.R. Rep. No. 1656, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 6121, 6129-30.

munity is waived in this case and the injunction should be granted. Even in the absence of §702, prior case law regarding sovereign immunity allowed suits for specific relief against federal agents acting beyond the scope of their authority when interfering with private or state property. Clearly §702 was intended to expand the rights of plaintiffs and to limit the sovereign immunity doctrine. Disallowing the State's claim on the basis of the conditions in §702 would restrict rather than expand the pre-amendment exception to the sovereign immunity doctrine. This would constitute a restriction which Congress did not intend.

CONCLUSION

The judgments below (that the Little Missouri River is navigable, that the State may not be foreclosed by the sovereign immunity doctrine from protecting its property rights to the riverbed, and that the Petitioners may be enjoined from interfering with those rights) should be affirmed.[34]

Respectfully submitted,

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[34]Petitioners have asked that the judgments of navigability be vacated. This is inappropriate as the Petitioners have not appealed that portion of the lower court judgments. Clearly, the federal courts have subject matter jurisdiction (28 U.S.C. 1331) to decide that issue. Moreover, *based on the Petitioners' argument,* there is no need to vacate that portion of the lower court judgments in order to *bar* the State's assertion of title and its right to protect same. It is in the public interest that the public's right to navigate the river be recognized as against all landowners—both public and private. Although it may not be binding on nonparties to this litigation, the judgment of navigability is an important step in defending the public right of navigation. Moreover, the judgments of navigability should be vacated only if the statute of limitations governs this case *and if* such statute has run. This latter fact has not yet been proven.